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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1966.

No.

CHARLES SHERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above case on January 30, 1967.

OPINIONS BELOW.

There was no opinion filed by the United States District Court for the Eastern District of Pennsylvania. The opinion of the Court of Appeals for the Third Circuit affirming the conviction of petitioner is not yet reported.

JURISDICTION.

The opinion of the Court of Appeals for the Third Circuit was filed on January 30, 1967, and a copy thereof is appended to the petition in the appendix at page 11. The Honorable William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States executed an order extending petitioner's time to file Petition for Writ of Certiorari on March 2, 1967. The jurisdiction of this court is invoked under 28 U. S. C. Section 1254(1).

QUESTION PRESENTED.

Petitioner was charged with a federal crime, theft from interstate shipment. He appeared with counsel before the District Court for the Eastern District of Pennsylvania on the date set for his trial, January 7, 1966. At this time it was brought to the Court's attention that petitioner's counsel was professionally engaged in the Common Pleas Court of Philadelphia and would be unable to appear with petitioner until the next Wednesday or Thursday, January 12th or 13th. The Court informed petitioner that his trial would begin Monday, January 10, 1966, and if he was without counsel at that time he would be remanded to custody and counsel would be appointed by the Court. Petitioner appeared Monday, January 10, 1966 with a young associate of his former counsel. A jury trial resulted in a verdict of guilty and petitioner was sentenced to five years imprisonment. The Court of Appeals affirmed. The Question presented is:

1. Was the petitioner deprived of a fair opportunity and reasonable time to select his own counsel in violation of the Sixth Amendment when he was informed on Friday, January 7, 1966 that his retained counsel could not appear for him at a trial to be held during the next week and he was subsequently placed on trial on Monday, January 10, 1966, with another counsel not of his choosing?

CONSTITUTIONAL PROVISIONS INVOLVED.

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy . . . the assistance of counsel for his defense." *U. S. C. Constitution, Amend. 6.*

STATEMENT OF THE CASE.

Petitioner was charged in an indictment returned on April 28, 1965 with violation of 18 U. S. C. Section 659, theft from interstate shipment. Mr. Thomas Gilson, a former United States attorney, who was representing petitioner in another matter, agreed to represent him in the defense of this federal offense. Petitioner was continued free on bail on May 25, 1965. On January 5, 1966, at the call of his case for trial, petitioner appeared without counsel. The Court revoked bail and petitioner was remanded to custody. Subsequently, on Friday, January 7, 1966, Mr. Gilson appeared with petitioner and requested a short continuance because of his engagement in a trial in the local Philadelphia courts. Petitioner's counsel explained that the trial in the local state court would probably continue until the following Wednesday or Thursday. Without technically ruling on the motion for a continuance, the Court informed petitioner that his trial would begin Monday, January 10, 1966, and furthermore, if petitioner appeared without counsel he would be remanded to custody and the Court would appoint counsel for him.

On Monday, January 10, 1966, petitioner appeared with new counsel, an associate of his former counsel. Petitioner did not object to representation by new counsel in open court. However, it is quite apparent from the Court's remarks of Friday, January 7, 1966 that objection would have been futile. In any event, petitioner was forced to trial with counsel not of his choosing. The trial, tainted with prejudicial tactical error by petitioner's young and inexperienced counsel, resulted in a verdict of guilty. Petitioner was sentenced to five years imprisonment after the Court denied his motions for Judgment N. O. V. and New Trial.

Petitioner then appealed to the United States Court of Appeals for the Third Circuit on the ground that he was denied a fair opportunity and reasonable time to obtain counsel of his own choice. The Court of Appeals in a per curiam opinion affirmed the judgment of the District Court.

Petitioner now seeks Certiorari to review the same question.

REASONS FOR GRANTING OF WRIT.

The decision below should be reviewed because it is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in *United States v. Johnston*, 318 F. 2d 288 (6th Cir. 1963).

1. In *United States v. Johnston, supra,* a co-defendant, one Balk, was convicted of violation of and conspiracy to violate a mail fraud statute. Balk had retained counsel, but when the time came for his trial his counsel was engaged professionally before the Michigan Supreme Court. The District Court insisted on going ahead with trial because of the substantial expense a continuance would entail. As a result, defendant Balk was ably represented by another attorney, in fact, a close associate of his former counsel and a man of extensive trial experience. On appeal from his conviction, the United States Court of Appeals for the Sixth Circuit reversed the District Court and held: the defendant was deprived of fair opportunity and reasonable time to select his own counsel in violation of the Sixth Amendment when he was placed on trial on Tuesday with another counsel not of his choosing after being informed on the prior Friday that the counsel he had employed could not appear for him. The Court of Appeals held the District Court's action was a violation of the Sixth Amendment without a showing of prejudice or injury.

In our case, the petitioner was informed on Friday, January 7, 1966 that his retained counsel could not appear for him at trial (14a). The District Court ordered petitioner to trial on Monday, January 10, 1966 (14a) and told him that his appearance without counsel on that date would result in revocation of bail and appointment of counsel by the Court (15a). This action effectively deprived petitioner of a fair opportunity and reasonable time to secure his own counsel within the meaning of the decision of the

Court of Appeals for the Sixth Circuit in *United States v. Johnston, supra.* The Court's action of Friday, January 7, 1966 made it impossible for petitioner to refuse the offer of a young associate by his former counsel. It is quite clear that had he appeared on Monday, January 10th, without counsel, he would have been remanded to custody and counsel would have been appointed. If petitioner would have waited and objected in open court to his representation by his former counsel's young associate, the Court could only follow one of two courses. First, if he appeared without counsel the Court could have remanded him to custody and appointed counsel, or, second, the Court could have forced the petitioner on trial with the associate of his former counsel as the Court did in *United States v. Johnston, supra.*

In any event, the decision of the Court of Appeals for the Third Circuit in the instant case, in affirming the action of the District Court which effectively deprived petitioner of his fair opportunity and reasonable time to select his own counsel, is in direct conflict with the decision of the Court of Appeals for the Sixth Circuit in *United States v. Johnston,* 318 F. 2d 288 (6th Cir. 1963).

2. The question presented by this case is of great importance to the administration of criminal justice in the Federal Courts. While many recent cases have dealt with the criminal defendant's right to counsel, the accused's right to a fair opportunity and reasonable time to secure counsel of his choice is a relatively untouched area. Primarily the Federal Trial Courts need definitive direction as to the procedure to be followed where a defendant has the financial ability and desire to retain counsel of his own choice.

Admittedly, a delicate balancing of interests is involved. On one hand, the Federal Courts must be able to administer criminal justice in a fair, orderly and swift manner. On the other hand, the individual accused of crime

must be given the opportunity to secure counsel of his own choice. A question of this importance is ripe for review and decision by the Supreme Court of the United States. Already two of the Circuits have split in cases involving this question. A definitive decision by the Highest Court of the Land will prevent confusion and injustice and will provide a meaningful guide for all the lower Federal Courts for handling of this problem.

CONCLUSION.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

THOMAS F. GILSON,
SEYMOUR KANTER,
Counsel for Petitioner.